

October 8, 2004

**EX PARTE**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

**Re: MB Docket No. 03-15, 98-120**

Dear Ms. Dortch:

Yesterday, October 7, 2004, Robert Sachs, Jill Luckett, Diane Burstein, and the undersigned met with Ken Ferree, Mary Beth Murphy, Rick Chesson, Bill Johnson and Eloise Gore of the Media Bureau, regarding the digital transition and the reconsideration of the Commission's decision on the meaning of "primary" video as to a broadcaster's digital signal.

On multicast issues, we reiterated the constitutional analysis provided in our previous written comments. Specifically, even if the meaning of the term "primary" video is ambiguous--the Commission has already determined that it means a single channel-- the Commission must avoid interpreting the statute in a way that raises serious constitutional questions. Interpreting "primary" to mean more than one program service, as broadcasters have urged in their reconsideration petitions, presents serious First and Fifth Amendment problems as to the rights of operators and programmers. To avoid these constitutional problems, the Commission should deny the reconsideration petitions and continue to interpret primary to mean "one," as it did in its 2001 decision.

As to digital transition issues, we expressed our concerns about the potential disruption to tens of millions of cable customers, once analog spectrum is returned, if the FCC does not give cable systems the right to convert digital broadcast signals to analog at the cable system headend until digital penetration reaches 85%. Cable systems may also continue to carry signals in digital of broadcasters who offer HD and other compelling digital content as they do today. Today, cable operators carry the digital signals of more than 450 TV stations. Assigning to cable operators the choice either to carry the digital signal of the broadcaster or to convert the digital signal to analog best correlates with subscriber welfare while preserving the carriage rights accorded broadcasters by the five-to-four Turner decision.

Please associate this letter with the record of the two above-captioned proceedings.

Respectfully submitted,

**/s/ Daniel L. Brenner**

Daniel L. Brenner